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In the Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN TURKISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government was required to grant immunity to a number of prospective defense witnesses.

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The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 623 F.2d 769. The opinion of the district court (Pet. App. 25a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 56a-57a) was entered on May 27, 1980. A petition for rehearing was denied on July 3, 1980 (Pet. App. 54a-55a). On August 26, 1980, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 19, 1980, and the petition was filed on September 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of income taxes, in violation of 18 U.S.C. 371; two counts of willfully attempting to evade personal income taxes for the years 1975 and 1976, in violation of 26 U.S.C. 7201; and two counts of willfully making and subscribing false income tax returns for the years 1975 and 1976, in violation of 26 U.S.C. 7206(1) (Pet. App. 2a; C.A. App. A-9 to A-19).[1] Petitioner was

[1] "C.A. App." refers to the joint appendix filed in the court of appeals; "Tr." refers to the transcript of trial proceedings; and "Govt. Ex." refers to government exhibits admitted in evidence at trial. Citations to the record herein are taken from the government's brief in the court of appeals.

fined $10,000 on each of the three counts of conspiracy and attempted evasion of taxes, and was sentenced to concurrent five-year terms of imprisonment on each of those counts, with all but three months of the sentence suspended and a three-year term of probation imposed (C.A. App. A-1248). Imposition of sentence on the counts of willfully making and subscribing false tax returns was suspended, and petitioner was placed on probation for three years (*ibid.*). The court of appeals affirmed (Pet. App. 1a-24a).[2]

1. The evidence at trial established that some time in September 1974, Joseph R. Hamilton, a floor broker on the New York Cotton Exchange, was approached by Frank Knell, another Cotton Exchange floor broker. Knell told Hamilton that C.R. Rittenberry & Associates, Inc. ("Rittenberry"), an oil company that was a customer of Knell's, wanted to engage in a tax straddle in crude oil futures and move $20 million from one tax year to the next.[3] Knell

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[2] Also charged as co-conspirators were Michael A. Kellogg, Frank Knell, and Donald B. Conlin. Knell and Conlin were acquitted. Kellogg was convicted but did not appeal.

[3] A commodity futures contract is a firm commitment to deliver or to receive a specified quantity and specified quality of a particular product at a specified time in the future at a specified price determined at public auction (Tr. 326). A commodity "straddle" is the simultaneous purchase and sale of the identical number of futures contracts in the same commodity for different future months.

Whatever their legality if legitimately executed, straddles are frequently utilized as tax avoidance devices. Thus, a trader looking for a short-term capital loss for the current tax year simultaneously purchases and sells at different prices equal numbers of commodity futures contracts in the same commodity to be performed in different months. If the price at which the contracts are being traded changes before the

asked Hamilton if he would take the opposite side of the transaction.[4] Hamilton told Knell that he was unable to do so but that he knew someone who might be able to handle the transaction.

Hamilton thereafter spoke with petitioner, who was a limited partner at Bear Stearns & Co. ("Bear Stearns") and head of its commodity futures trading. Petitioner said he was interested in the transaction and would contact Pressner Trading Corporation ("Pressner"), a commodity futures trading company,

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end of the current tax year, the trader liquidates the contracts on which he has incurred a loss by buying or selling additional contracts in order to take a position opposite to the original contracts in the same commodity for the same month, and thereby realizes on paper a short-term capital loss. The trader simultaneously reestablishes the straddle by buying or selling contracts in order to take a position identical to the contracts liquidated in an equal number of contracts in the same commodity for some other month in the future that is beyond the end of the current tax year. By reestablishing the straddle, the trader "locks-in" a profit on the contracts not liquidated that is approximately equal to the loss on the liquidated contracts. The trader then holds this straddle into the next tax year. As a result of the entire transaction, the trader has realized a short-term capital loss in one tax year and moved the gain into the next tax year (Tr. 357-369, 375-376).

[4] The Crude Oil Futures Market was a commodity futures trading ring operating on the floor of the New York Cotton Exchange. Trading on the Crude Oil Market began on September 10, 1974, with five contracts being traded on that day. During the next month, the number of outstanding contracts on the market remained at five (Tr. 643-645, 1754). Because there was no legitimate trading interest in the Crude Oil Market, Rittenberry's orders would not have been filled when they were sent to the trading ring to be executed unless another party was found in advance.

to see if it would take the other side of the transaction (Tr. 672-673, 2324, 3695).

Petitioner then met with two principals of Pressner, Jules Nordlicht and Stephen M. Sundheimer. Petitioner explained that an oil company wanted to enter into a multi-million dollar tax straddle on the Crude Oil Market and that there was an opportunity to make money from this transaction if Pressner would take the other side. Petitioner stated that the tax loss would have to be established quickly because the oil company's fiscal year ended on October 31, and that the price would be prearranged for Pressner to make a sizeable net profit that Nordlicht and Sundheimer would share with petitioner.[5] Nordlicht told petitioner to try to arrange the transaction (Tr. 2834-2838, 2844-2847, 3112-3119, 3620-3623).

Shortly thereafter, petitioner told Hamilton that the oil company now wanted a tax loss of $12 million and that prices on the market would have to move about $2 per barrel in order for the oil company to obtain the paper loss by the end of October. Petitioner asked whether Hamilton could move the prices on the market down from the prevailing price of $10.50 per barrel to about $8.50 per barrel, where they would initiate the tax straddle, and then move prices back up sharply until the losing side of the oil company's straddle reached $12 million. Hamilton stated that since there was no trading activity on the market, he was confident that he could move the

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[5] In a legitimate commodity futures trade, the price of the contract is determined at a public auction conducted by open outcry in the trading ring (Tr. 329). It is not an accepted practice for the parties to the contract to prearrange the price before the contract is executed in the trading ring (Tr. 346-347, 365-367, 558-560, 566-567).

market prices down and up as desired; he cautioned, however, that if prices exceeded $12 per barrel, legitimate traders might be tempted to enter the Crude Oil Market and thereby interfere with the price manipulations (Tr. 698-701, 704-705, 775, 1755, 3625-3626). Beginning on about September 20, 1974, Hamilton bid down the closing prices on the Crude Oil Market by $.25 per day [6] until October 9, when they reached approximately $8.50 per barrel (Tr. 705-706; Govt. Exs. 1J, 23A).[7]

In early October, petitioner told Hamilton that the plan for the tax straddle was set and gave directions for its execution, including the number of contracts to buy and sell, the future months to be covered by the contracts, and the price differences or spreads between the months of each straddle. On October 10 and 11, 1700 contracts were executed between Rittenberry and Pressner (Tr. 705, 718-721, 751-754, 2834-2843, 3627-3631).

Once the contracts for the straddle were placed, petitioner instructed Hamilton to take the market up as far and as fast as possible because the oil company had to establish its tax "loss" before the close of its fiscal year on October 31, 1974. Hamilton did so in the same way that he had taken the market down.

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[6] During this period, the closing price for a contract month on the Crude Oil Market was set at the last bid of the day, if there was one. If there was no bid that day, it would be set at the last offer. If there was no offer, a "nominal" price was set by the exchange essentially on an arbitrary basis (Tr. 706). Under the rules of the exchange, there was a $.25 limit on the daily change in the closing price of any contract month (Govt. Ex. 23A).

[7] Of course, since there was no legitimate trading interest in the market, these contrived bids were not accepted.

On October 25, pursuant to petitioner's instructions, the "losing" side of Rittenberry's straddle was "rolled over" in the same manner that the original contracts had been placed and executed. This transaction established a tax loss for Rittenberry of $12,379,893. In November 1974, again on petitioner's instructions, the straddle was liquidated completely, with a net real loss to Rittenberry (and a net gain to Pressner) of approximately $319,000. This net loss, along with the brokerage commissions it paid, was the cost to Rittenberry of moving $12 million in income from one tax year to the next, thereby deferring payment of approximately $4 million in federal income taxes (Tr. 753-755, 2524, 2844-2848, 3466-3467, 3631-3632; Govt. Exs. 1A, 1C, 1CC, 22A, 22B).

Rittenberry engaged in a second tax straddle on the Crude Oil Market for its fiscal year that ended October 31, 1975, in large measure to defer further the gain that was transferred into its 1975 fiscal year by the first tax straddle. The trades for the second Rittenberry tax straddle were executed in much the same fashion as those for the first tax straddle. As with the first Rittenberry tax straddle, petitioner planned and directed every aspect of the transaction and the sham loss it produced (Tr. 767-768, 780-790, 2885-2887, 3645-3647).

The tax loss Rittenberry obtained from the second straddle was approximately $16,211,899, most of which it gained back after the end of that fiscal year. The net real loss to Rittenberry, and the corresponding gain to Pressner, was approximately $450,000, and this amount, together with its brokerage fees, represented the cost to Rittenberry of securing its tax loss (Tr. 3467; Govt. Exs. 1B, 1C, 1CC, 22B, 22C).

After the completion of the first Rittenberry tax straddle, petitioner asked Nordlicht for his share of the profits in cash. As a result, on December 12, 1974, petitioner and an assistant went to Pressner's offices, where Nordlicht and Sundheimer gave petitioner approximately $40,500 in cash (Tr. 2869-2871, 3122, 3653-3658, 3660-3662, 3665-3671; Govt. Ex. 5C). Thereafter, petitioner received approximately $382,604 in 1975 and $81,350 in 1976 for his role in arranging the tax straddle scheme and for some other transactions in which he was involved (Tr. 792-804, 2855-2864, 3123, 3671-3676, 3684; Govt. Exs. 1D, 1DD, 20D). Petitioner did not report these payments on his federal income tax returns for either 1975 or 1976, and the amount of taxes he evaded was approximately $196,246 in 1975 and $34,173 in 1976 (Tr. 3435-3444, 4292-4300; Govt. Exs. 20A, 20B, 20C, 20D).

Petitioner's defense was primarily presented through his own testimony. Flatly contradicting numerous government witnesses, petitioner denied that he prearranged and directed the Rittenberry tax straddles, or indeed that he had anything at all to do with those transactions. Petitioner also denied that he had received any of the payments charged by the government. The jury convicted petitioner on all counts.[8]

2. After the government had concluded its case, petitioner moved for the first time that 17 prospective defense witnesses be granted "use" immunity and compelled to testify under 18 U.S.C. 6002. He ar-

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[8] The district court fully agreed with the jury's rejection of petitioner's defense, commenting that "beyond a reasonable doubt * * * [petitioner] committed perjury at the trial" (Sentencing Tr. 6).

gued that these witnesses could provide exculpatory evidence but would decline to testify on Fifth Amendment grounds unless directed to do so pursuant to a grant of immunity. The district court reserved decision on the motion until after the trial. Following the jury's verdict of guilty, petitioner moved for a new trial or acquittal based on the failure to afford immunity to these witnesses (Pet. App. 4a-5a, 26a-29a).

By order dated August 23, 1979, the district court denied petitioner's motion (Pet. App. 29a). In a subsequent memorandum (*id.* at 25a-53a), the court held that the federal judiciary "has no inherent power to grant immunity" (*id.* at 32a). The court also held that the government's decision to refrain from immunizing these witnesses did not violate the Compulsory Process Clause of the Sixth Amendment and was not an "affirmative act by the government which was designed to prevent defense witnesses from testifying" (*id.* at 36a) or "improper or arbitrary governmental conduct" (*id.* at 37a). Finally, after noting that the Due Process Clause "probably requires that where a defendant makes a sufficient and timely showing of need for the testimony of a witness who invokes his or her Fifth Amendment privilege, the government must grant immunity to the witness or suffer dismissal" (*id.* at 41a-42a),[9] the court found that petitioner's request for immunity was untimely (*id.* at 33a-34a) and that the proffered testimony of these witnesses was cumulative and not material (*id.* at

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[9] In its due process analysis, the court considered it immaterial whether, as here (Pet. App. 4a, 43a), the government grants immunity to its own witnesses (*id.* at 42a n.20, 43a-44a).

46a-52a). Accordingly, it denied petitioner's motion for post-judgment relief.

3. On appeal, the court of appeals affirmed (Pet. App. 1a-24a). The court held that "the Sixth Amendment does not support a claim for defense witness immunity" (*id.* at 9a) and that "the Due Process Clause [contains no] general requirement that defense witness immunity must be ordered whenever it seems fair to grant it" (*id.* at 17a).[10] On this basis, the court of appeals, disagreeing with the views of the district court "on the general availability of defense witness immunity" (*id.* at 19a), concluded that "trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution" (*ibid.*).[11] In addition, the court of appeals sustained, as an alternative holding, the district court's determinations that petitioner's mid-trial request for immunity was untimely (*id.* at 18a) and that the expected testimony of these prospective defense witnesses would have been "cumulative, immaterial, or impeaching only on collateral matters" rather than providing "material, exculpatory evidence" (*id.* at 19a).

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[10] The court noted (Pet. App. 10a n.2) that petitioner had raised no claim of prosecutorial misconduct in this case.

[11] The court left open the possibility that immunity might be required in "some circumstances not now anticipated" (Pet. App. 17a), and in particular, "where the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that the witness is a potential defendant" (*id.* at 20a).

ARGUMENT

Further review of this case is unwarranted. The court of appeals, in an extensive opinion upon which we rely, correctly held that, at least in the absence of prosecutorial misconduct,[12] neither the Fifth nor the Sixth Amendment required the government to grant immunity to the 17 prospective defense witnesses identified by petitioner. Moreover, this Court has recently declined to review the issue of defense witness immunity. See *United States* v. *Praetorius*, 622 F.2d 1054 (2d Cir. 1979), cert. denied *sub nom. Lebel* v. *United States*, No. 79-6756 (Oct. 6, 1980); *United States* v. *Klauber*, 611 F.2d 512 (4th Cir. 1979), cert. denied, No. 79-1229 (Apr. 21, 1980); *United States* v. *Riggs*, 609 F.2d 1007 (5th Cir. 1979) (table), cert. denied, No. 79-6295 (June 16, 1980); cf. *Weisman* v. *United States*, 624 F.2d 1118 (2d Cir. 1980), cert. denied, No. 80-62 (Oct. 6, 1980). For the reasons stated in our briefs in opposition in those cases and in *Horwitz* v. *United States*, petition for cert. pending, No. 79-2065 (filed June 27, 1980),[13] we submit that petitioner's arguments are without merit and that the petition should be denied.

At all events, even if such reverse immunity might be constitutionally required in some circumstances,

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[12] The district court expressly found (Pet. App. 36a-37a) that there was no "affirmative act by the government which was designed to prevent defense witnesses from testifying * * * [or any] improper or arbitrary governmental conduct * * * [or] improper exercise of the government's investigative function."

[13] Copies of these briefs in opposition are being provided to counsel for petitioner.

the court below correctly rejected petitioner's claim on the alternative ground, as the district court had held (Pet. App. 33a, 44a, 46a-52a), that his request "was untimely, since it should properly have been made at the beginning of the trial * * * [,] and that [petitioner] had not shown that any of the witnesses for whom [he] sought immunity would give material, exculpatory testimony" (*id.* at 5a). As the court of appeals elaborated (*id.* at 18a-19a):

> The circumstances of this case do not remotely approach a situation where lack of defense witness immunity could be found to deny constitutionally protected fairness. In the first place, the demand for immunity was initially made in the middle of the trial and properly found to be untimely by Judge Broderick * * *. Secondly, Judge Broderick carefully considered the expected testimony of the witnesses sought to be immunized and concluded that none of them would provide material, exculpatory evidence. Their testimony would either have been cumulative, immaterial, or impeaching only on collateral matters. Thus, the trial court's refusal to order the prosecutor to confer use immunity was plainly correct.

These fact-bound determinations are inappropriate for review by this Court, which does not sit "merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

In any event, these determinations were correct. Petitioner's request for immunity was clearly untimely and would have caused a significant disruption in the trial of this case if the government had been required to consider it in detail. As the district court

explained (Pet. App. 33a-34a), in a finding that was upheld by the court of appeals (*id.* at 18a-19a n.5):

> Some 171 days elapsed between the first pre-trial conference herein and the beginning of the trial. * * * [Petitioner] * * * [was] aware that the government's investigation of the crude oil market was continuing during this period; this very fact was argued to * * * [the court] by * * * counsel in seeking a substantial adjournment of the original trial date. Yet it was never drawn to * * * [the court's] attention during this period that * * * [petitioner] had any intention of requesting immunization of witnesses. * * * [The two prosecutors who had conducted the crude oil investigation] jointly represented the government in all pre-trial proceedings in this case, and they jointly presented the government's case at trial. The case was a complicated one, involving the complex organization and operations of the commodities futures market. Once trial began the full time of the two government attorneys * * * was fully absorbed with the presentation of the case in the trial room.
>
> The demand that witnesses be immunized was made at the close of the government's case, in the middle of the trial, when neither of the men in charge of the investigation was in a position—because of their trial duties—either to make a meaningful recommendation to the United States attorney that the testimony requested might be necessary to the public interest, or to shoulder the "heavy burden" (*Kastigar* v. *United States*, 406 U.S. 441, 461 (1972)) of marshalling the evidence then available with respect to any of the proposed witnesses whom the government might indict in the future.
>
> The resourcefulness of * * * [petitioner's] counsel at trial, and * * * [his] thorough knowl-

> edge and understanding of the case, * * * [persuade the court] * * * that * * * [he] should have been able to anticipate that many prospective witnesses would invoke the Fifth Amendment, and in * * * [the court's] judgment * * * [he] should have presented to the prosecutors and to * * * [the court] prior to trial the substance if not the details of the applications made at the close of the government's case.[14]

Likewise, the district court's determination that the testimony of the prospective defense witnesses would be cumulative and not material (Pet. App. 46a-52a) was correct. Testimony by Cotton Exchange Officials that wash sales, prearranged sales, and piecemeal trades were encouraged as a promotional device for the new Crude Oil Market (Pet. 18) would not have aided the defense since the jury could hardly have believed, in light of all the evidence, that

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[14] Despite the district court's express findings in this regard, petitioner argues (Pet. 15) that the untimeliness of his request caused "no prejudice to the government" because "the government made a substantive determination not to immunize." However, this argument does not fully rebut the added burden that would have been imposed on the government if respondent's mid-trial motion for immunity had been granted. Furthermore, any grant of immunity must be approved by the Attorney General, the Deputy Attorney General, or a designated Assistant Attorney General on the basis of detailed information submitted by the United States Attorney. See 18 U.S.C. 6003(b); *United States Attorneys' Manual* ¶ 1-11.901, at 27-30 (Nov. 16, 1979). Contrary to petitioner's contention, the record does not "make[] plain" (Pet. 15) that the question of defense witness immunity was considered at length in accordance with this process, but rather shows only that the United States Attorney declined to forward the request to the Department of Justice in the first instance.

petitioner had engaged in such activities merely for promotional purposes on behalf of the Exchange (Pet. App. 46a-47a). The proposed testimony that movement of the market down to $8.50 and then up to $12 was also "consistent with the personal and family objective of a principal of" the Genora Trading Company (Pet. 21) fails to contradict the overwhelming evidence that the market movement was directed by petitioner (Pet. App. 50a-51a). Nor would the outcome have reasonably been affected by the proffered testimony that the Financial Vice-President for Rittenberry had planned the company's tax straddles, since, even if true, the remaining evidence in the case clearly established petitioner's involvement in the scheme (Pet. App. 51a-52a). Finally, petitioner has not demonstrated (Pet. 22-23) that the district court abused its discretion in excluding extrinsic evidence from four floor brokers that was designed to rebut Hamilton's statement on cross-examination regarding alleged money transfers he engaged in with them (Pet. App. 48a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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